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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DAVID GALLEGOS,

Plaintiff and Appellant,

v.

TESORO SIERRA PROPERTIES,
LLC, et al.,

Defendants and Respondents.

B282757

Los Angeles County
Super. Ct. No. BC550108

APPEAL from a judgment of the Superior Court of
Los Angeles County, Michael B. Harwin, Judge. Dismissed.

Law Office of April Verlato, April Verlato; Esner, Chang
& Boyer, Stuart B. Esner and Joseph S. Persoff for Plaintiff
and Appellant.

Horton, Oberrecht, Kirkpatrick & Martha, Cheryl A.
Kirkpatrick and Peter C.L. Chen for Defendant and Respondent
Tesoro Sierra Properties, LLC.

Yoka & Smith, Mary Childs and Christine C. De Metruis
for Defendant and Respondent Titan Contractors.

David Gallegos fell off a concrete curb and injured his ankle. He sued Titan Contractors (Titan) and Tesoro Sierra Properties, LLC (Tesoro). On February 16, 2017, the trial court filed judgment on a jury verdict finding that Titan was not in control of the premises and was not negligent. The jury found that Tesoro (the owner and operator of the gas station and minimart on the premises) and Gallegos were equally negligent. Gallegos's damages totaled \$209,643.81, and the jury awarded Gallegos \$104,821.91 against Tesoro and zero damages against Titan.

Gallegos filed a motion for new trial on March 2, 2017, accepting the jury's finding that Titan was not negligent, and objecting only to the inadequacy of the damages awarded to Gallegos against Tesoro. In an excess of caution, Titan's counsel attended the April 19, 2017 hearing on the new trial motion, "only . . . to see that if you are inclined to grant a new trial . . . whether or not it's going to be on the issue of liability and damages or only damages. If it's only damages then we don't really have an issue because we had zero damages and zero responsibility against us on the jury verdict form." Titan's counsel did not otherwise participate in the hearing. The trial court denied the motion for new trial, with Tesoro's counsel to give notice. On May 1, notice of the ruling denying Gallegos's motion for new trial was served and filed in the trial court.

On March 3, 2017, Titan filed a memorandum seeking costs of \$56,158.45, including \$45,951.50 in expert witness fees under Code of Civil Procedure section 998.¹ Gallegos filed a motion to

¹ All subsequent statutory references are to the Code of Civil Procedure.

strike and/or tax costs on March 23. After a hearing on April 25, the court took Gallegos's motion under submission. On May 5, the court entered a minute order denying Gallegos's motion to tax costs and awarding Titan the full amount requested, concluding that Titan's section 998 offer of \$2,901 was reasonable under the facts.

On May 19, 2017, Gallegos filed his notice of appeal on Judicial Council Form APP-002. Where the form asks for the date of entry of the judgment or order appealed from, Gallegos gave the February 16, 2017 date of the judgment on the jury verdict. Underneath, where the form lists eight specific appealable orders with boxes to check and a ninth box for "other," Gallegos checked the box stating, "An order after judgment under Code of Civil Procedure section 904.1(a)(2)."² The notice contained no mention of the order denying the motion to tax costs.

Gallegos filed his notice designating the record on appeal on May 26, 2017, giving the date of the "Judgment or order appealed from" as April 19, 2017 (the date of the hearing at which the trial court denied Gallegos's motion for new trial). Gallegos designated for inclusion in the clerk's transcript documents related to the new trial motion and to his motion to tax Titan's costs, including the May 1, 2017 notice of ruling on the new trial motion and the May 5, 2017 minute order on the

² Gallegos incorrectly states in his reply brief that he checked the box stating "An order or judgment under Code of Civil Procedure section 904.1(a)(3)-(13)."

motion to tax costs,³ and requested reporter's transcripts of the hearings on the motion for new trial and the motion to tax costs.

On June 23, 2017, the clerk of this court sent Gallegos a letter stating that he was in default, because his case information statement was incomplete ("The order or judgment being appealed is required.").⁴ Gallegos filed a second case information statement on June 30, which gave the date of entry of the judgment appealed from as April 19, 2017 (again, the date of the hearing at which the trial judge denied the motion for new trial), and gave the date of notice of entry as February 27, 2017 (it is unclear what this date refers to). Gallegos attached a copy of the May 1, 2017 notice of ruling denying Gallegos's motion for new trial.

On July 3, 2017, the clerk sent Gallegos notice that his second case information statement was deficient because Gallegos did not attach a copy of the final judgment. In response, on July 7, 2017, Gallegos filed a copy of the February 16, 2017 judgment on the jury verdict.

On July 11, 2017, this court discharged the order to show cause and placed the appeal on active status. After briefing was complete, we dismissed the appeal as to Tesoro by stipulation of the parties.

³ The notice of entry of the order denying the motion to tax costs was filed August 28, 2017.

⁴ We grant Titan's July 2, 2018 request that we take judicial notice of documents filed in this court following the filing of the notice of appeal, and we take judicial notice on our own motion of other correspondence in the clerk's file.

DISCUSSION

The sole issue Gallegos raises in his opening brief is the award of section 998 expert witness fees to Titan.⁵ Gallegos does not challenge the judgment or mention the denial of his motion for new trial. Titan’s respondent’s brief argues that we lack jurisdiction to hear Gallegos’s appeal because he did not properly appeal from the order denying his motion to tax costs. We agree and dismiss the appeal.

In his notice of appeal, and in all subsequent submissions to this court, Gallegos identified only the judgment on jury verdict, or the post-judgment order denying his motion for new trial, as the judgment or order from which he appealed. While an order denying a motion for new trial is not appealable, “[s]uch an order . . . may be reviewed on appeal from the underlying judgment.” (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 18 (*Walker*).) If a “notice of appeal states only that the appeal is from the order denying a new trial,” we have the discretion to “construe the notice to encompass the underlying appealable judgment,” so long as “it is reasonably clear the appellant intended to appeal from the judgment and the respondent would not be misled or prejudiced.” (*Id.* at pp. 18, 22.) This is consistent with the policy of liberally construing a notice of appeal in favor of its sufficiency, “ “if it is reasonably clear

⁵ Gallegos’s opening brief fails to state the amount Titan sought under section 998. Titan sought, and the trial court awarded, a total of \$56,158.45 in costs, of which \$45,951.50 was for fees under section 998. The remaining \$10,206.95 was for litigation costs awarded to Titan as the prevailing party, and Gallegos does not challenge that portion of the award.

what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.” ’ ’ (Id. at p. 20.)

Walker does not apply here, because Gallegos’s notice of appeal correctly identifies the underlying appealable judgment as the judgment appealed from. Even without liberal construction and *Walker*’s holding, the notice of appeal would be sufficient to support an appeal arguing that the trial court erred when it denied his postjudgment motion for new trial.

But Gallegos’s notice of appeal nowhere designates the order denying the motion to tax costs as the order appealed from. He gave the date of the judgment and then checked the box indicating that he appealed an order after judgment. In all his subsequent filings, in response to questions from the clerk of this court, Gallegos repeatedly stated that he was appealing from the judgment and the post-judgment order denying his new trial motion, with no mention of the order denying the motion to tax costs. “ ‘ “Where several judgments and/or orders occurring close in time are separately appealable (e.g., judgment and order awarding attorney fees), each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal.” ’ [Citations.] The policy of liberally construing a notice of appeal in favor of its sufficiency (Cal. Rules of Court, rule 8.100(a)(2)) does not apply if the notice is so specific it cannot be read as reaching a judgment or order not mentioned at all.” (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173.)

In *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, the defendant filed a notice of appeal on May 26, 1988, stating the appeal was “ ‘from the

judgment filed May 5, 1988, *a copy of which is attached as Exhibit “A.”*’ (Italics added.) Only a copy of the May 5 judgment was appended.” (*Id.* at p. 46.) In briefing, he also challenged a May 9 attorney fees award that was part of an order denying a motion to tax costs, from which he did not take a separate appeal. (*Id.* at pp. 45-46.) The court of appeal concluded it had no jurisdiction to review the fees award. “A postjudgment order which awards or denies costs or attorney’s fees is separately appealable [citations], and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it.” (*Id.* at p. 46.) The court of appeal also declined to apply the rule of liberal construction. “The rule favoring appealability in cases of ambiguity cannot apply where there is a clear intention to appeal from only part of the judgment or one of two separate appealable judgments or orders. [Citation.] ‘Despite the rule favoring liberal interpretation of notices of appeal, a notice of appeal will not be considered adequate if it completely omits any reference to the judgment being appealed.’” (*Id.* at p. 47.)

Gallegos argues that because he checked the box stating he was appealing a postjudgment order, the notice of appeal was ambiguous, and we should apply the rule of liberal construction and conclude the notice also included the denial of his motion to tax costs. But we repeat: “ ‘ “ ‘each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal.’ ” ’ [Citations.] Indeed, ‘ “[w]hen a party wishes to challenge both a final judgment *and* a postjudgment costs/attorney fee order, the normal procedure is to file *two separate appeals*: one from the final judgment, and a second from the postjudgment order.’ ” [Citation.] ‘ “ “[I]f a judgment or order

is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.’ ” ’ ”

(*Nellie Gail Ranch Owners Assn. v. McMullin* (2016)

4 Cal.App.5th 982, 1007-1008.) Because a postjudgment order related to costs is a final order collateral to the judgment, separate appeals are generally the rule where section 998 awards are concerned. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1316-1317.)

Gallegos’s notice of appeal never “expressly specified” the appealable order denying the motion to tax costs. The only arguable hint that he meant to appeal from that order was his inclusion of related filings in his initial designation of the record, filed a week later. But even if we were to conclude that the designation of those records made the notice of appeal initially ambiguous, Gallegos eliminated all ambiguity in his responses to our queries about the subject of his appeal. He repeatedly responded that he appealed only from the judgment, and in conjunction with the judgment, the order denying his motion for new trial.

Gallegos now states the notice of appeal was unclear “and should have referenced the date of the order denying the motion to tax costs *instead of or in addition to* the date of the judgment.” (Italics added.) He cannot have it both ways. The notice of appeal expressly specifies only the date of the judgment, giving us jurisdiction to address arguments on appeal regarding the judgment and the denial of the new trial motion. Gallegos did not properly appeal from the order denying his motion to tax Titan’s costs.

DISPOSITION

The appeal is dismissed. Respondent Titan Contractors shall recover costs on appeal.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.